Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1320

IRVING V. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 5, 1976

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A) was not reported. The District Court wrote no opinion but gave an oral ruling which is reproduced herewith (App. B).

JURISDICTION

The opinion of the Court of Appeals was filed on January 14, 1976. Petitioner filed a timely petition for rehearing, which was denied by order of the Court of Appeals filed February 13, 1976. The Court of Appeals ordered that this Petition be filed on or before March 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the Fifth and Sixth Amendments to the Constitution of the United States entitled Petitioner to complete Miranda warnings by Special Agents of the Intelligence Division of the Internal Revenue Service during the initial "critical" interviews, which took place during the accusatory stage of a solely criminal tax investigation.

(2) Whether the Fifth and the Fourteenth Amendments to the Constitution of the United States entitled Petitioner to discover the names of prosecution witnesses within a reasonable time prior to trial.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States of America, Amendment V:

> No person shall be * * * compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law;***

Amendment VI:

> In all criminal prosecutions, the accused shall * * * have the assistance of counsel for his defense.

Amendment XIV:

> ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner was charged with three (3) counts of attempting to Evade and Defeat Federal Income Taxes in violation of 26 U.S.C. §7201 by indictment filed October 3, 1973, in the District Court for the Eastern District of California. On August 15, 1974, the Honorable Thomas J. MacBride heard and denied Petitioner's Motion for Discovery of Prosecution Witnesses and his Motion to Suppress Statements and Evidence. Thereafter, commencing November 12, 1974, Petitioner was tried by jury and was found guilty on all Counts of the indictment. On January 24, 1975, Petitioner was given a sentence of three years as to each count, with sentences to run concurrently; required him to spend the first 120 days of each sentence in a penal institution, the sentences to also run concurrently; suspended the remainder of each sentence and placed the taxpayer on probation for five years; and fined him $5,000.

Upon his appeal to the Ninth Circuit, his conviction was affirmed and his petition for rehearing to that Court was denied.

The theory of prosecution upon which Petitioner stands convicted was based on additional unreported gross receipts on his 1967, 1968 and 1969 Federal Tax Returns.

Crucial to the prosecution's case were statements and records obtained from the taxpayer. Taxpayer's statements and records were used as a basis to establish the alleged understatement of gross receipts in the amount of $8,962.63 in 1967, $9,312.09 in 1968, and $13,022.99 in 1969.

On August 15, 1974, Petitioner made a motion for suppression of all statements and records obtained by the Internal Revenue Service where the agents failed to give the Petitioner the Miranda warnings. Petitioner testified he was first contacted in his own office by Special Agent, Robert Johnson, on or about June or July of 1970. (Tr. I-5) Special Agent Johnson was brought in to investigate the matter specifically to look into any criminal conduct by defendant taxpayer. (Tr. I-26) Special Agent Johnson gave defendant no warnings of any sort. He stated he wanted to see defendant's records, to talk to him, and said "You can throw me out if you want to." (Tr. I-6) Special Agent Johnson again contacted taxpayer on several occasions after July 1970, and did not, on any of those occasions, give him the Miranda warnings required by *Miranda* v. *Arizona*, 384 US 436. Special Agent Johnson disputed this by his testimony that he cautioned taxpayer it was a criminal

investigation which included possible fraud. (Tr. I-16) Johnson further testified, as best as he could recall, he did give taxpayer the Miranda warnings (Tr. 1-17), and that on the first visit of July 13, 1970, he obtained some bank statements and cancelled checks. (Tr. I-17, 18) On the following day, Special Agent Johnson obtained copies of the patient ledger cards and claimed he again advised the taxpayer "of his rights and said he (the taxpayer) did not have to say anything." (Tr. I-18) On the third and fourth visits, Special Agent Johnson testified that he did not give the Miranda warnings and obtained some adding machine tapes. (Tr. I-18)

Special Agent Johnson set forth in great detail in an initial interview memorandum all that transpired on July 13, 1970. That memorandum did not mention his giving the Miranda warnings. (Tr. I-22) Johnson could not explain why the memorandum of the initial interview failed to set forth the Miranda warnings which he contended he had given to taxpayer.

In July of 1970, Revenue Agent, Louis Poor, during an audit of taxpayer's records, obtained information which he turned over to Special Agent Johnson. This information was used to further the criminal tax investigation. (Tr. I-26) Revenue Agent Poor admits he never gave the defendant any of the Miranda warnings prior to obtaining the records which the Government felt were incriminating. (Tr. I-45) Revenue Agent Poor stated he made certain memoranda from these records, examined bank statements and bank deposits, and disclosed this information to Special Agent Johnson sometime

before July 13, 1970. (Tr. I-46, 49) The taxpayer realized for the first time that he was the subject of a criminal investigation on or about October 27, 1972, long after records and interviews had been obtained from him by the Special Intelligence Division. (Tr. I-6) In defendant's motion it was contended that such evidence obtained from him should be suppressed.

The trial judge denied defendant's motion to suppress ruling that defendant was not entitled to the *Miranda* warnings because he was not in custody. (App. B)

On August 15, 1974, taxpayer also moved for the production of the names of those prosecution witnesses who would testify during trial. (Tr. I-51) The matter was argued before the court by both counsel. Since only witnesses that would testify at the trial were requested, their identity was both material and relevant. The court found that the Government would not be prejudiced if it revealed the identity of the witnesses. (Tr. I-57) The court concluded that it was a practical impossibility for the defendant to make any further showing that these witnesses would be material to his case since their identity was unknown to the defendant. (Tr. I-58) Nevertheless, the court denied taxpayer's motion on that very basis. (Tr. I-60)

One of the key prosecution rebuttal witnesses, whose name was knowingly not disclosed to the defendant, was the only witness whose testimony was asked to be heard again by the jury, just before reaching their verdict of Guilty. The jury had deliberated for hours before requesting to again hear this testimony reread.

ARGUMENT

I

AT THE TIME OF THE INITIAL INTERVIEW BY SPECIAL AGENT, PETITIONER WAS ENTITLED TO THE FULL MIRANDA WARNINGS.

It is clear that the minimum requirements of *Miranda* v. *Arizona*, 384 U.S. 436, apply to tax investigations. *Mathis* v. *United States*, 391 U.S. 1. It is also clear that the mere fact that the interview took place in petitioner's office does not relieve the Government from the minimum requirements of *Miranda*. *Orozco* v. *Texas*, 394 U.S. 324. While the Court of Appeals below rejected petitioner's *Miranda* arguments on the ground that he was not in custody, petitioner respectfully submits that such a wooden holding is inconsistent with this Court's intendment of when *Miranda* requirements apply. This Court explained what it means by "custodial circumstances" in *Miranda* when in Footnote 4, it described them as an "investigation which had focused on an accused." (384 U.S. 436, 444.) See also *United States* v. *Wong*, 74-1636 (9th Cir., Sept. 23, 1974). Heretofore, courts have not exclusively looked to prison walls, handcuffs, or back room police station physical restraint as the touchstone of *Miranda*. They have also taken note of the focus of the investigation upon the accused and the "target" of the Government investigators. *Orozco* v. *Texas*, *supra*. *United States* v. *Robinson*, 142 U.S. App. D.C. 43, 439 F. 2d 553.

Here petitioner was given only a semblance of the advice of rights to which *Miranda* has entitled him.[1] Petitioner was not told of his absolute right to remain silent nor to refuse to answer questions if said questions tended to incriminate him. The courts implementing *Miranda* have jealously guarded the exact substance of this right. *United States* v. *Mullings*, 364 F.2d 173, 175 (2nd Cir.) ; *United States* v. *Fox*, 403 F.2d 97, 100 (2nd Cir.). In *Miranda*, this Court held that as an "absolute prerequisite to interrogation" the person must be told of the "right to consult with a lawyer and to have the lawyer with him during interrogation" (384 U.S. 471). Here the Special Agent told petitioner "I want to talk to you and go over your records and you can throw me out if you want to."

Such a watered-down explanation of this right has been held inadequate. *Windsor* v. *United States*, 389 F.2d 530 (5th Cir.). In addition, absolutely nothing was told to petitioner about his rights to an appointed attorney.[2] Since the date of the *Miranda* decision, courts have suppressed statements which did not include this portion of the required warning. *Green* v. *United States*, 411 F.2d 588 (10th Cir.) ; *United States* v. *Miller*, 261 F. Supp. 442 (D. Del.)

[1]The IRS itself recognizes that the warnings given by a special agent during an interview do not comply with *Miranda*. Instructions issued to IRS special agents provide for full *Miranda* warnings only when the person is taken into custody or placed under arrest. See *U.S. Tax Cases*, CCH 67-2, p. 84,547, Par. 9489 n.9. (R. 9, p. 19.)

[2]This Court's decision in *Michigan v. Tucker*, 94 S. Ct. 2357, is not to the contrary, since that case concerned the question whether an inadequate *Miranda* warning could taint other evidence which police uncovered by virtue of statements that were suppressed.

II

CONFLICT IN THE CIRCUITS

The usual Federal tax investigation has two possible stages: first, the civil stage where an audit is conducted by Revenue agents and possibly, second, the criminal stage where a Revenue agent has uncovered fraud and has turned the case over to the Special Agents of the Intelligence Division whose job is limited to obtaining evidence in support of criminal tax fraud prosecutions. As has been outlined heretofore, petitioner's case involved Special Agents of the Intelligence Division whose exclusive function was to prepare evidence for the prosecution of petitioner.

The law in the Seventh Circuit is that, whenever a case has shifted to the Intelligence Division of the Internal Revenue Service, the involved taxpayer must be accorded the benefit of full *Miranda* warnings. *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir.). In reaching its decision on this issue, the Seventh Circuit Court of Appeals relied heavily upon the District Judge in *United States* v. *Turzyanski*, 268 F. Supp. 847 (N.D. Ill.), who ruled as follows:

> [O]nce a taxpayer becomes the subject of a criminal tax investigation, as evidenced by the referral of the investigation to the Intelligence Division or otherwise, our adversary process of criminal justice has become directed against him as a potential defendant. Any evidence obtained from him is admissibly only if the taxpayer furnished it after knowning and voluntarily waiving his Constitutional rights and privileges. [Citations omitted.]

> To hold otherwise would lead to the anomalous conclusion that a person suspected of bank robbery, sale of narcotics, murder, rape or other serious crime is entitled to greater protection of his constitutional rights than a person suspected of violating the internal revenue laws. For when the silent transition from civil to criminal investigation takes place in a tax case, the taxpayer being interrogated and asked to furnish his books and records is just as surely a prime suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes. (Id. at 850-851.)

The matter of custody again came up in a recent 7th Circuit case, *United States* v. *Oliver*, 505 F.2d 301 (7th Cir. 1974) in which that circuit again held that even though the taxpayer was not in custody that the *Miranda* warnings had to be given. Citing from that case, the court states at page 305:

> "The practical effect of these misapprehensions during questioning of a taxpayer was to 'compel' him to provide information that could be used to obtain his conviction in a criminal tax fraud proceeding, in much the same way that placing a suspect under physical restraint leads to psychological compulsion. Thus, the misapprehensions are tantamount to the deprivation of the suspect's 'freedom of action in any significant way,' repeatedly referred to in *Miranda*."

The decision of the United States Court of Appeals for the Ninth Circuit in this case is in square conflict with the above rule of the Seventh Circuit and a need for uniformity of decision exists.

III

DENIAL OF DISCOVERY OF PROSECUTION WITNESS WAS DENIAL OF DUE PROCESS AND A FAIR TRIAL.

The trial court ruled that prosecution witnesses could not be discovered under Rule 16(b) because of the Ninth Circuit's ruling in *United States* v. *Richter*, 488 F.2d 170. The Ninth Circuit agreed with the trial court's ruling.

The Advisory Committee, recognizing the restrictions under Rule 16, as amended in 1966, proposed amendments in 1970 which substantially expanded defense as well as prosecution discovery. It provides specifically for the furnishing of a Government witness list to the defense, together with any records of prior felony convictions of a witness. The need of justice for broader discovery is best exemplified by the Supreme Court statement of policy in *Dennis* v. *United States* (1966) 384 U.S. 855, 873:

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts. Exceptions to this are justifiable only by the clearest and most compelling considerations."

The taxpayer had a right in this case to prosecution witnesses' names in order to ensure fundamental fairness. *United States* v. *Richter*, *supra*, p. 173. Under the Fifth Amendment of the United States Constitution, it has been held repeatedly that a criminal defendant

is entitled to a fair trial. *Chambers* v. *Mississippi*, 93 Sup.Ct. 1038 (1973) The Fifth Amendment, through the due process clause, requires a fair trial in true substance, not just in form. Logic and the uncontradicted affidavit of defendant's counsel (R. 34) notes that a proper defense to the charges against defendant could not be presented without being provided a list of the names of the witnesses which the prosecution was going to call during trial. It is difficult for this writer to imagine how a defendant, whose counsel is unprepared and has no idea what evidence will be presented against him can have a fair trial. In this country, our system of justice is based upon an adversary system which requires that both sides be prepared, not just one side. As any first year law student knows, an effective attorney is one who works hard and *prepares*.

The Sixth Amendment of the United States Constitution provides that a defendant is entitled to confront witnesses and have the assistance of counsel for his defense. It is submitted that the right to confront witnesses is a right in substance and not in form. An attorney, in order to give a client a fair trial, must be able to cross-examine witnesses effectively. This cannot be done when first confronted by an unknown on the witness stand. It is well established that the right to counsel means the *effective* right to counsel, not merely a lawyer sitting next to the accused at the counsel table. *Powell* v. *Alabama* (1932) 287 U.S. 45; *Glasser* v. *United States* (1942) 315 U.S. 60; *Chambers* v. *Mississippi*, *supra*.

In summary, the court has the inherent discretion to effectuate and implement the rights guaranteed to the accused by the United States Constitution. The wisdom of the rules allowing discovery as of this date is beyond debate: "trial by ambush" is not an effective way to guarantee a fair trial to any party. That decision as to civil litigation was decided with finality when the Federal Rules of Civil Procedure were adopted. Perhaps Judge Will summarized the anomaly the Government now urges upon us when he stated as follows:

> "You know, I have a great concern that in a civil case we require both sides to submit their witnesses to maximum deposition when all that is involved is money. In a criminal case, the Government doesn't even want to disclose the name of a person so the other side can go out and interview him, when what is concerned is life or liberty. To me this is a very strange aberration of the processes of justice as between civil and criminal cases . . ." Appellant's United States Supreme Court Brief, page 7, *Will* v. *United States*, 389 U.S. 90.

IV

THE IMPORTANCE OF THIS CASE

The Government failed to provide the names of the witnesses it was going to use at trial and thereby prevented defendant from having an adequate defense. The Government failed to apprise defendant of his right to refuse to incriminate himself and subsequently utilized evidence thereby obtained to convict him. This case clearly involves a question of exceptional import-

ance meriting consideration by this Court. Because this country utilizes a system of self-taxation and because our tax laws are so technical and complex, there exists, on the part of those who administer those tax laws, a great potential to abuse the Fifth Amendment's privilege against self-incrimination. The legality of the Government's labeling a citizen a target defendant for a non-tax-related reason and then proceeding to harass him and to convict him out of his own mouth without extending him the full panoply of Fifth Amendment rights is a question of far-reaching significance. E.g., this case presents an excellent opportunity for judicial consideration of the propriety of the anomalous situation existing with respect to Special Agents of the Intelligence Division of the Internal Revenue Service. It is counsel for petitioner's understanding that the involved Intelligence Division of the Internal Revenue Service is this country's only criminal law enforcement agency that has, as a matter of routine, substituted its own limited advice of rights for those set out by this Court in *Miranda* v. *Arizona*.

CONCLUSION

WHEREFORE, it is submitted that this Court should grant this petition and issue a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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March 5, 1976

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* v. IRVING V. COOPER, *Appellant.*	NO. 75-1321 MEMORANDUM

Appeal from the United States District Court
Eastern District of California

Before: KILKENNY, SNEED and KENNEDY, Circuit Judges.

Appellant was indicted, tried by a jury and convicted on three counts of income tax evasion covering the years 1967, 1968, and 1969.

Our examination of the record convinces us that appellant's assignments of error: (1) that the trial court committed error in denying his motion for discovery of the names of government's witnesses, and (2) that the trial court committed error in refusing to grant his motion to suppress certain evidence, are groundless.

(1) The record fails to show that appellant was in any way prejudiced in the preparation of his defense by the court's action in denying his motion for an early

discovery of witnesses, or that he was denied a fair trial by reason of the failure to grant such motion. See *United States* v. *Richter*, 488 F.2d 170, 173 (CA9 1973).

(2) On this record the officers were not required to give *Miranda*[1] warnings. See *United States* v. *Chikata*, 427 F.2d 385, 387-388 (CA9 1970).

The judgment of conviction is affirmed.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

APPENDIX B

APPENDIX B

ORAL OPINION OF THE DISTRICT COURT ON MOTION FOR PRODUCTION OF WITNESSES' NAMES

THE COURT: Well, I do not think it merits further discussion. Your position here, Mr. Wohl, is no diffferent —as Mr. Babcock pointed out—from any defense counsel in any case. There is one exception in that in this type of case the Court cannot be worried about the fact Dr. Cooper is not going to go out and kill somebody or threaten somebody's safety or their property or something like that if they testified against him. That certainly is one reason why the Government is not required to reveal its witnesses. But I think it is only one of the reasons. It is not the only reason. If it was the only reason, then certainly there would have been some indication of that as a justification. I think even within the rule itself, and it is not expressed there, actually, that you do not come within the suggestions, that you cannot say within the rules of the *Richter* case because you haven't made a showing. I realize the difficulty of your making a showing in this case. The fact there is a difficulty there doesn't assist the Court or assist you in this situation. So having no authority, I find myself with no authority even within the suggestion of the *Richter* case to grant your motion. It must be denied.

ON MOTION TO SUPPRESS

* * *

THE COURT: All right. I think I can decide this rather promptly from the bench and I am going to do so.

* * *

Now the next question is whether or not Johnson did in fact adequately advise—well, first of all, let me say this: That I do not find in any of the evidence that has been presented to the Court any requirement whatsoever for a *Miranda* warning. This was not an in-custody situation in any sense of the word or any understanding of that term. So, I do not find any requirement whatever for a *Miranda* warning, and that is all I need to say.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of three counts of willful evasion of income tax for the years 1967-1969, in violation of 26 U.S.C. 7201. The court sentenced petitioner to concurrent three-year terms of imprisonment on each count, all but 120 days of which were suspended, and placed him on probation for five years on the condition that he pay a $5,000 fine (III-Tr. 463-464).[1] The court of appeals affirmed (Pet. App. A). Petitioner principally contends that the trial court should have suppressed certain statements he made to a special agent of the Intelligence Division of the Internal Revenue Service, because the agent failed to warn him of his constitutional rights in accordance with *Miranda* v. *Arizona*, 384 U.S. 436.

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[1] "Tr." references are to the reporter's transcript of pretrial and trial proceedings.

1. Petitioner does not challenge the finding of the district court that he was not interviewed by the special agent under custodial circumstances. Nor does he claim that his statements were actually coerced or that he was not given the advice of rights which the Internal Revenue Service requires its special agents to give upon initial contact with the taxpayer. Instead, petitioner contends (Pet. 7) that he had become the focus of a criminal investigation by the Internal Revenue Service and was entitled to the full *Miranda* warnings. However, in *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976, this Court expressly rejected the same argument. There, the Court held that special agents of the Internal Revenue Service, investigating potential criminal income tax violations, were not required to warn a person of his constitutional rights in accordance with *Miranda* v. *Arizona*, *supra*, prior to interviewing him in a non-custodial setting. Thus, the conflict upon which petitioner relies (Pet. 9-10) has already been resolved against him by this Court.

2. Petitioner further argues (Pet. 11-13) that the trial court erred in denying his motion for the names of the prosecution witnesses who would testify at trial. Petitioner points to no specific instances of prejudice arising from the denial of his motion,[2] but instead argues generally that "fundamental fairness" requires pretrial production of the names of the prosecution's witnesses upon request.

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[2]Petitioner states (Pet. 6) that "[o]ne of the key prosecution rebuttal witnesses, whose name was knowingly not disclosed to the defendant, was the only witness whose testimony was asked to be heard again by the jury, just before reaching their verdict of Guilty." But this fact does not establish that petitioner was prejudiced because he was unaware of this witness's name prior to the witness's testimony. Moreover, it is not likely the prosecution knew who its rebuttal witnesses would be until it had heard petitioner's case.

While petitioner's claim touches upon an issue of considerable importance that we believe may one day require consideration by this Court — the issue of the power of the district courts to order the prosecution to disclose the names of its witnesses in non-capital cases[3] — this is plainly not the proper case for that purpose. At least two courts of appeals have stated that a district court should order disclosure upon a specific showing of need by the defense. See *United States* v. *Cannone*, 528 F. 2d 296 (C.A. 2); *United States* v. *Richter*, 488 F. 2d 170, 173-175 (C.A. 9). Another court has indicated its view that the district court has discretion to order witness disclosure even without a showing of materiality and reasonableness by the defense, if the district court determines that such action would facilitate the conduct of the trial. *United States* v. *Jackson*, 508 F. 2d 1001, 1007 (C.A. 7).

It is the position of the United States that the foregoing decisions are wrong and that the district courts possess no power to order the prosecution to disclose the identity of its witnesses in advance of trial. The error of these decisions is confirmed by the history of present Rule 16, Fed. R. Crim. P., from which Congress specifically deleted a provision proposed by this Court that would have empowered district courts to order disclosure (see H. Conf. Rep. No. 94-414, 94th Cong., 1st Sess., p. 12 (1975)).

In the instant case, however, petitioner has not met the requirements of *Richter* and *Cannone* for a particularized showing justifying his disclosure request (see Pet. App. B), and the district court did not elect for other reasons to exercise such discretion as it might possess, as in

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[3]Compare 18 U.S.C. 3432, which provides that a defendant charged with a capital offense must be given a list of the prosecution's witnesses at least three days prior to trial.

Jackson. It seems plain, therefore, that no court of appeals would reverse petitioner's conviction on this ground. Moreover, since petitioner's trial was held under the former Rule 16, review by this Court would accomplish little in establishing the principles that govern present and future requests for disclosure of the identity of prosecution witnesses.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

DOJ-1976-05